# 2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

# CHAPTER 5

# DEVELOPMENTS IN EVIDENCE

## Table of Contents



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# 2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

# DEVELOPMENTS IN EVIDENCE

## Outline of Instruction

## I. SECTION IV - RELEVANCY AND ITS LIMITS.

### A. **Rules 401-403. Relevant Evidence**.

1. *United States v. Burns*, 53 M.J. 42 (2000). Accused charged with conspiracy to commit rape and indecent assault. At the crime scene (the accused's apartment) the police found an unopened condom under the accused's bed. The government introduced a photo of the condom at trial claiming that this sexual paraphernalia was relevant to show the existence of a conspiracy to commit rape. The defense objected on relevancy grounds because there was no link between the condom and the alleged crimes. The CAAF ruled that under 401, this evidence was relevant to corroborate the victim's statement that the rape occurred in the bedroom and as evidence of the conspiracy. The CAAF also noted that the evidence was not unfairly prejudicial and provided a backdrop that is probative of what happened.

2. *United States v. Matthews*, 53 M.J. 465 (2000). Accused tested positive for THC on 29 April 1996. At trial she presented a good soldier defense and testified that she did not use marijuana between 1 and 29 April 1996. She also testified that she had no idea how the test results could be positive. The military judge allowed the government to rebut this good soldier/innocent ingestion defense with positive test results from a command directed urinalysis that occurred 23 days after the first urinalysis. The CAAF reversed the Air Force Court and held that the judge abused his discretion in admitting this 2nd urinalysis. The court said that evidence of an unlawful substance in the urine at a time before the charged offense can not be used to prove knowledge, and evidence of an unlawful substance in the urine after the charged offense *and not connected to the charged offense* may not be used to prove knowing use on the charged date.

B. **Rule 404(a). Character of the Accused/Victim.** *United States v. Dimberio*, 52 M.J. 550 (A.F. Ct. Crim. App. 1999). Accused convicted of aggravated assault against his child. Accused claimed that the mother had equal access to the child and was the real perpetrator. In order to support this defense, the accused wanted to introduce expert testimony that the mother suffered from mental problems including histrionic behavior, poor coping skills, alcoholism and impulsive behavior. The military judge excluded the evidence as irrelevant because there was no link to the mother's impulsive behavior and violence. The Air Force Court affirmed. The court noted that this evidence failed on relevance grounds because what the defense was really trying to do is introduce profile evidence. This is not allowed and not a proper character trait of the witness because under 404(a)(3) and 608, the only relevant character trait is the witness's character for truthfulness. The court also rejected the defense argument that due process requires the court to relax the rules of evidence when evaluating evidence favorable to the defense.

C. **Rule 404(b). "Other Acts" Evidence.**

1. *United States v. Phillips*, 52 M.J. 268 (2000). Accused charged with larceny, conspiracy, and false swearing for entering into a sham marriage in order to live off post and draw BAQ. Government presented evidence of the marriage and on rebuttal introduced evidence of two homosexual relationships that the accused was involved in. The military judge admitted this evidence under MRE 404(b) to rebut the accused's claims that he and his wife had a marriage relationship and to show motive and intent. The court held that the military judge did not abuse his discretion because this evidence was logically relevant to show that the marriage was a sham and the analysis would be the same whether the infidelity was homosexual or heterosexual.

2. *United States v. Henry*, 53 M.J. 108 (2000). Accused convicted of rape and adultery with his 15-year-old stepdaughter. In her pre-trial statement to CID, the victim told the police that the accused made her watch pornographic movies with him. The accused house was searched. No movies were found but two or three pornographic magazines were found, some of which contained order forms for videos. At trial the government admitted this evidence over defense objection under 404(b) to show intent. The CAAF held that the military judge did not abuse his discretion because the magazines were relevant to show intent and possible grooming on the part of the accused. The CAAF also said the evidence was relevant to impeach the victim's in court testimony because on the stand she recanted some of her testimony and denied ever watching movies with the accused.

3. *United States v. Baumann,* 54 M.J. 100 (2000). Accused convicted of sexually molesting his daughter. The CAAF held that it was error (harmless) for the military judge to admit evidence that the accused molested his sisters 25 years ago. The military judge admitted this evidence over defense objection under 404(b), to show the wife's motive for finalizing the divorce and to rebut credibility attacks against her. The evidence was a statement by the accused's mother to his wife that the accused had molested his sisters when he was 13. The CAAF held that the probative value of this evidence was outweighed by the unfair prejudice, particularly because the government had other evidence to explain the reason for the divorce and rebut the defense claim of motive.

4. *United States v. Tanksley*, 54 M.J. 169 (2000). Accused, Navy Captain was convicted of indecent liberties with his child. The government introduced testimony from another daughter that he had sexually abused her 30 years earlier. This evidence was admitted under 404(b) to show the accused's intent. The CAAF held that the military judge did not abuse his discretion in admitting this evidence.

D. **Rules 413 and 414. Evidence of Similar Acts of Sexual Assault and Child Molestation.**

1. Balancing Test.

a. *United States v. Dewrell*, 52 M.J. 601 (A.F. Ct. Crim. App. 1999). In this case, the Air Force Court announced a less restrictive 403 balancing test for evidence admitted under MRE 413 and 414. In the context of MRE 413 and 414, the trial judge will "test for whether the prior acts evidence will have a substantial tendency to cause the members to fail to hold the prosecution to its burden of proof beyond a reasonable doubt with respect to the charged offenses."

b. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999). Accused convicted of rape, sodomy and other offenses. Court held, consistent with *Dewrell,* that the military judge did not err in admitting MRE 413 evidence. In dicta, the court also noted that the military judge's limiting instruction was not needed to tell the members that they could not use this evidence for the general proposition that the accused is a bad person and therefore committed the charged offenses.

2. Due Process Concerns.

a. *United States v. Wright*, 53 M.J. 476 (2000). The accused pleaded guilty to indecent assault of P. in Oct. 96. He pleaded not guilty but was convicted of indecent assault of D. in April of 96, and housebreaking of P's room in Oct. 96. The government admitted the offense that he pleaded guilty to under MRE 413 to prove propensity to commit indecent assault against D. The defense claimed that 413 was unconstitutional. CAAF rejected this argument, following the rationale of the Federal Circuit Courts on both the due process and equal protection grounds.

b. *United States v. Henley*, 53 M.J. 488 (2000). Accused convicted of committing oral sodomy on his natural son and daughter. At trial, the government introduced incidents outside the statute of limitations under both 414 and 404(b). The trial court admitted it for both purposes. The Air Force Court admitted it under 404(b) and said that they did not need to address the 414 issue. The CAAF agreed with the Air Force Court's approach and affirmed. The CAAF did go on to say, in light of their opinion in *Wright*, that 414 is constitutional and this evidence would have been admissible under that rule as well.

## II. SECTION V - PRIVILEGES.

A. **Spousal Privilege**. *United States v. McElhaney*, 54 M.J. 120 (2000). In this case the accused was charged with attempted rape and carnal knowledge against his niece. The accused's wife discovered these incidents when she intercepted letters between the accused and his niece. The wife then confronted the accused with the illicit nature of these letters. The accused admitted to his wife of the long running relationship and his attempts to have sexual intercourse with his niece. The defense sought to suppress these statements between the accused and his wife under the marital privilege. The government contended that the accused had waived any privilege because the accused had disclosed much of his communication with his wife to the victim and the victim's parents. The CAAF agreed. The court noted that a significant portion of the conversation had been disclosed when the accused told the victim in a letter that the cat was out of the bag, that his wife knew almost everything, and that he had told her parents about stolen kisses. The court reasoned that this was more than just telling the victim that a conversation had occurred and, taken in context, it was a significant disclosure of the substance of the conversation.

B. **Psychotherapist-Patient Privilege**.

1. *United States v. Rodriguez*, 54 M.J. 156 (2000). The CAAF affirmed the Army Court's ruling that *Jaffee v. Redmond* did not create a psychotherapist-patient privilege in the military.

2. *United States v. Paaluhi,* 54 M.J. 181 (2000). Consistent with *Rodriguez*, the court ruled that *Jaffe v. Redmond* did not create a psychotherapist-patient privilege in the military. The CAAF reversed the conviction, however, holding it was ineffective assistance for the defense counsel to tell the accused to talk to a Navy psychologist without first getting the psychologist appointed to the defense team.

## III. SECTION VI - WITNESSES.

### A. **Rule 608(b). Impeachment.**

1. *United States v. Cobia,* 53 M.J. 305 (2000). Accused charged with rape, forcible sodomy with a child, indecent acts, and adultery. Over several years, the accused had sexually groomed his 13 year-old stepdaughter and committed various sexual acts with her including intercourse on several occasions. The accused was tried in state court for these offenses. He was also tried for two of these same offenses at his court-martial. In state court, the accused pleaded guilty, but there was no allocution or providencey inquiry. At his court-martial, the accused denied any wrongdoing and claimed that his civilian guilty plea was a result of coercion and his inability to understand the process. At trial, the defense moved to preclude this evidence. The military judge ruled that the convictions were not admissible under 404(b) but could be used for impeachment. Following the ruling the defense introduced the conviction during their direct examination of the accused and asked him to explain his guilty plea. The CAAF, citing to *Ohler,* held that the defense waived any objection by introducing evidence of the conviction in their direct examination of the accused.

2. *United States v. Jenkins*, 54 M.J. 12 (2000). Accused convicted of larceny and other crimes for his involvement in a scheme to cash government checks with fake I.D. cards. The defense theory was that the accused was framed by the real perpetrators and by his old girl friend. The accused testified and, on cross, the government asked him a number of questions about what other witnesses had testified to and then asked the accused if these witnesses were lying. Defense did object to these questions at trial. On appeal, defense claimed it was improper for the trial counsel to ask these questions. The CAAF ruled that it was error (harmless) for the trial counsel to ask the accused if other witnesses were lying. According to the court, this type of questioning violates the MRE 608 limitations, which allow for opinions on character only. These questions are improper because the witness is becoming a human lie detector and the answers are not helpful.

B. **Rule 609**. **Prior Convictions**. *Ohler v. United States*, 20 S. Ct. 1851 (2000). In a 5-4 decision, the Court affirmed the 9th Circuit and held that if the defense loses a motion *in limine* on excluding FRE 609 evidence against the accused and then brings the conviction out during the direct examination of the accused, they waive any objection to the ruling on appeal.

C. **Rule 615. Witness Sequestration.** *United States v. Langston*, 53 M.J. 335 (2000). Accused entered mixed pleas. During the providence inquiry, the military judge allowed three of the female victims to be present in the courtroom even though some would later be fact witnesses on the contested charges. The military judge ruled that MRE 615 did not apply to providence inquiries. The CAAF held that it was error (harmless) for the judge to allow the witness's to remain in the courtroom, because a providence inquiry was still part of the judicial proceedings. Note, this outcome would not change under the new MRE 615, if the witnesses would be fact witnesses.

# IV. SECTION VII - OPINIONS AND EXPERT TESTIMONY.

A. **Qualifications.** *United States v. McElhaney*, 54 M.J. 120 (2000). During the sentencing phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. The CAAF held that it was error for the judge to admit this evidence. Citing to *Houser*, the court noted that the expert lacked the proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

B. **Helpfulness**.

1. *United States v. Grigouruk*, 52 M.J. 312 (2000). Accused charged with molesting his young stepdaughter. The military judge ordered government to provide a defense requested expert witness in child psychology. At trial, the defense did not call the expert. The CAAF remanded the case for further inquiry on the accused's claim of ineffective assistance because of the defense counsel's failure to call the expert.

2. *United States v. Armstrong,* 53 M.J. 76 (2000). Accused charged with indecent acts with his daughter. Accused made a partial confession to the police and, at trial, stated that any contact with his daughter was not of a sexual nature. On rebuttal the government called an expert in child abuse who testified that in her opinion the victim suffered abuse at the hands of her father. The defense did not object. On appeal, the CAAF held that it was reversible error for the expert to testify in this fashion.

3. *United States v. Robbins*, 52 M.J. 455 (2000). Accused charged with two specifications of sodomy with a child under 16. Judge alone case. The victim testified and the government also called a social worker to tell about statements she and her mother made to the social worker. While laying the 803(4) foundation, the expert testified that her job is to do intake interviews and refer cases to a panel of clinicians who substantiate cases. She said that in this case, the allegation was substantiated. A second witness also testified about what the victim told her. This witness testified that when the victim reported the incident to her, she appeared not to be lying. The defense did not object to any of this evidence. The CAAF distinguished this case from prior cases and held that, because this was a judge alone case, and the statements touching on credibility were incidental, there was no error.

C. **Reliability.** *United States v. Huberty,* 53 M.J. 369 (2000). Accused convicted of indecent acts and consensual sodomy. Defense wanted to introduce expert testimony that, based on his testing, the accused could not have exposed himself in public. The expert would also testify that the 17-year-old sodomy victim was manipulative. The military judge did not allow the expert to testify about the results of the test or offer an opinion that the accused could not be an exhibitionist. In rebuttal, the Government called an expert to testify that the accused may have been grooming the 17-year-old for sex. On appeal, defense claimed that the judge erred by limiting the defense expert and allowing the government expert to testify. The CAAF affirmed the conviction. The court noted that the trial judge had properly evaluated the defense expert's opinion under *Daubert* and concluded that his opinions were not generally accepted and had not been subjected to peer review. The court also noted that the expert's opinion that the accused could not be an exhibitionist based on the MMPI was not relevant because such testimony is impermissible profiling.

**D. Nonscientific Expert Evidence. Impact of Kumho.**

1. Handwriting Analysis. Two more district courts are following the trend to limit the expert's testimony to characteristics and prevent them from either testifying that a certain individual was the author of a questioned document or to their degree of certainty. *United States v. Ruthaford,* 104 F. Supp. 2d 1190 (Dist. of NE 2000); *United States v. Santillan*, 1999 U.S. Dist. Lexis 21611 (Northern Dist. of CA).

2. Eyewitness Identification Experts. *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000). Trial judge abused his discretion by excluding a defense expert on the weaknesses of eyewitness identification. The trial judge's comments that he wanted to "experiment" were indicative of the abuse of his discretion, as was his failure to even conduct a *Daubert* type reliability hearing.

3. Future Dangerousness. *United States v. Latorree*, 53 M.J. 179 (2000). Accused pleaded guilty to sodomizing a 7 year old girl. In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other sexual assaults. On appeal, defense claimed it was error for the expert to provide this information. CAAF ruled that the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*, but any error in admitting the testimony was harmless.

4. *United States v. Hankey,* 203 F.3d 1160 (9th Cir. 2000). In this case, the accused was charged with conspiracy and distribution of drugs. Accused was a member of a gang and a co-accused and other witnesses testified for the defense and denied any wrong doing. In rebuttal, the government called a police officer to render an expert opinion that part of the gang affiliation code was not to testify against another gang member. Defense said that the witness's opinion was not reliable and more prejudicial than probative. 9th Circuit applying *Kumho* said the judge did not abuse his discretion in admitting this evidence.

5. *United States v. Norris*, 217 F.3d 262 (5th Cir. 2000). Trial judge erred in holding that reliability analysis did not apply to video re-enactment. No error, however, because the judge in effect did do a reliability determination before admitting the evidence.

**E. Polygraphs.**

1. *United States v. Clark*, 53 M.J. 280 (2000). Accused pleaded guilty to larceny and false official swearing. In his judge alone case, the stipulation of fact included information that the accused failed a polygraph test. The CAAF ruled that it was plain error for the military judge to admit this evidence, however, the error did not materially prejudice his rights. Therefore, no relief.

2. *United States v. Southwick*, 53 M.J. 412 (2000). Accused convicted of wrongful distribution of drugs. She sold the drugs to an informant. At trial, the defense attacked the credibility of the informant by trying to demonstrate that the Air Force had not done a proper certification of him. In response, the informant testified that he had been polygraphed before being accepted as an informant. The defense did not object to this evidence. The CAAF held it was harmless error for this evidence to come before the fact finders, because the polygraph was not directly related to any issues at trial or the informant's in court testimony.

3. *United States v. Tanksley,* 54 M.J. __ (2000). Buried on page seven of a nine-page statement to NIS agents, the accused stated that he refused to take a polygraph examination. The government offered the entire statement and the information about his refusal to take a polygraph was not redacted. The defense did not object. The CAAF ruled that any passing reference to a polygraph examination did not materially prejudice the accused.

## V. SECTION VIII - HEARSAY.

A. **Rule 803(2) Exited Utterance**. *United States v. Moolick*, 53 M.J. 174 (2000). Accused convicted of rape. Immediately after the victim accused him, the accused claimed that she had grabbed him first. The accused did not testify but the defense wanted to introduce this statement as an excited utterance. The military judge did not admit the statement. The CAAF ruled it was prejudicial error and reversed the conviction.

B. **Rule 807 Residual Hearsay**. *United States v. Pablo*, 53 M.J. 356 (2000). Accused convicted of child abuse. At trial, the victim testified. Government also introduced the testimony of a school counselor under the residual hearsay exception. The CAAF said this was an abuse of discretion and reversed the conviction.

## VI. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE.

A. **Rule 103. Rulings on Evidence**.

103(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(2). Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

B. **Rule 404 (a). Character Evidence Generally**. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

C. **Rule 701. Opinion Testimony by Lay Witnesses**. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

D. **Rule 702. Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, my testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or date, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

E. **Rule 703. Bases of Opinion Testimony by Experts**. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

## VII. CONCLUSION.